IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

NANCY YOUNG, Plaintiff, v. RECONSTRUCTIVE ORTHOPEDIC ASSOCIATES, II, P.C. and THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY, Defendants.	: : : : : : : : : :	CIVIL ACTION No. 03-2034

MEMORANDUM AND ORDER

J. M. KELLY, J. **FEBRUARY , 2004**

Presently before the Court are Plaintiff Nancy Young's ("Plaintiff") Motion for Leave to Amend Complaint Pursuant to Federal Rule of Civil Procedure 15 ("Motion to Amend"), Defendant Reconstructive Orthopedic Associates, II, P.C.'s ("ROA") response and Plaintiff's reply thereto; and Defendant ROA's Motion to Dismiss Counts Two Through Five of Plaintiff's Amended Complaint ("Motion to Dismiss"), Plaintiff's response and ROA's reply thereto. Plaintiff seeks to amend her Complaint a second time to add a claim against ROA under Pennsylvania's Wage Payment and Collection Law ("WPCL"), 43 Pa. Stat. § 260.1, et seq. ROA opposes this second amendment because it contends that the additional state law claim is futile as WPCL claims are preempted by the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001, et seq. For the following reasons, Plaintiff's Motion to Amend is **GRANTED** and Defendant ROA's Motion to Dismiss is **DISMISSED AS MOOT**.

I. BACKGROUND

Plaintiff was employed by ROA from January 1999 to November 2000. She alleges that, when she was hired, ROA undertook the responsibility of enrolling her in a long-term disability insurance policy (the "Policy") with Defendant Northwestern Mutual Life Insurance Company ("NML"). Plaintiff claims that, although she completed all the necessary forms, either ROA or NML failed to properly enroll her in the Policy. Unaware of the alleged failure to enroll her, Plaintiff, after becoming totally disabled from Parkinsonism, made a claim for long-term disability benefits under the Policy. NML declined her claim because she was not, and never was, an insured under its disability policy.

On March 28, 2003, Plaintiff filed a five-count Complaint against NML and ROA. Count One of that Complaint, against NML, alleges a violation of ERISA, and the remaining four counts, against ROA, allege state law claims. On May 22, 2003, Plaintiff filed an Amended Complaint (the "Amended Complaint") that added Count Six against ROA under Section 404 of ERISA for breach of fiduciary duty. Plaintiff now seeks to amend the Amended Complaint by adding another state law claim under Pennsylvania's WPCL based upon the same facts set forth in the Amended Complaint.

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 15, "[a] party

may amend the party's pleading once as a matter of course at any time before a responsive pleading is served . . . . Otherwise a party may amend the party's pleading only by leave of the court or by written consent if justice so requires." Fed. R. Civ. P. 15(a). Generally, leave to amend should be freely granted absent a concern of: (1) undue delay; (2) bad faith or dilatory motive; (3) continued failure to cure deficiencies by prior amendments; (4) undue prejudice to the opposition; or (5) futility of amendment. Forman v. Davis, 371 U.S. 178, 182 (1962).

The alleged futility of Plaintiff's amendment to the Amended Complaint is at issue in this matter. To determine whether a proposed amendment would be futile for purposes of Rule 15(a), courts abide by the standard of legal sufficiency applicable to a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). See Oran v. Stafford, 226 F.3d 275, 291 (3d Cir. 2000); In re Burlington Coat Factory Securities Litigation, 114 F.3d 1410, 1434 (3d Cir. 1997); Burstein v. Retirement Account Plan for Employees of Allegheny Health, Education and Research Foundation, 263 F.Supp.2d 949, 956 (E.D. Pa. 2002). When reviewing a motion to dismiss pursuant to Rule 12(b)(6), the Court must accept the non-movant's well-pled averments of fact as true and view all inferences in the light most favorable to the non-moving party. Angelastro v. Prudential-Bache Securities, Inc., 764 F.2d 939, 944 (3d Cir. 1985); Society Hill Civic Assoc. v. Harris, 632 F.2d 1045, 1054 (3d Cir. 1980); Abbdulaziz v. City of Philadelphia,

No. Civ. A. 00-5672, 2001 U.S. Dist. LEXIS 16972, at *4 (E.D. Pa. Oct. 18, 2001). A motion to dismiss is appropriate only when the movant establishes that he is entitled to judgment as a matter of law and there exists "no set of facts in support of his claims which would entitle him to relief." Ford v. Schering-Plough Corp., 145 F.3d 601, 604 (3d Cir. 1998); Schrob v. Catterson, 948 F.2d 1402, 1405 (3d Cir. 1991). Thus, if Plaintiff's proposed amendment to the Amended Complaint would survive a motion to dismiss, then futility does not exist.

III. DISCUSSION

As in ROA's Motion to Dismiss, ROA argues in its response to Plaintiff's Motion to Amend that Plaintiff fails to state a claim upon which relief can be granted because Plaintiff's WPCL claim is preempted by Section 514 of ERISA, 29 U.S.C. § 1144, and thus, her amendment is futile. We do not address the sufficiency of Plaintiff's factual allegations under Pennsylvania's WPCL at this time, as ROA does not dispute the sufficiency of those allegations in its Motion to Amend.

By arguing only preemption, it appears that ROA will pursue the applicability of ERISA only to this matter. The parties do not, at this time, set forth their contentions regarding facts that support or challenge the applicability of ERISA, for example, Plaintiff's status as a "participant" and each

Defendant's status as a "fiduciary" under ERISA. At this early stage and considering the facts presented thus far, it is questionable whether ERISA will ultimately apply in this matter. Specifically, we question whether ERISA will be implicated at all by virtue of ROA's or NML's alleged failure to enroll Plaintiff, since Plaintiff may not fall within the definition of a "participant" and, therefore, not entitled to sue under ERISA. See, e.g., Miller v. Rite Aid Corporation, 334 F.3d 335 (3d Cir. 2003).

Moreover, the Court is mindful of a potential trial strategy in which Defendants may now move for dismissal of state law claims based upon ERISA preemption and then later argue that ERISA does not even apply to Plaintiff. If Defendants employ this strategy and are successful on both fronts, then Plaintiff would be left without any means of recourse. See Miller, 334 F.3d at 345 n.9. For that reason and under the facts of this case, Plaintiff's alternative pleading is wise. If, for example, ERISA does not apply, then ROA's ERISA preemption argument fails, and the state law claim that Plaintiff seeks to add to the Amended Complaint may be successful. Alternative pleading is permissible pursuant to the Federal Rule of Civil Procedure 8, which provides, in pertinent part, that "[a] party may also state as many separate claims or defenses as the party has regardless of consistency and whether based on legal, equitable, or maritime grounds." Fed. R. Civ. P. 8(e).

For the foregoing reasons, Plaintiff's Motion to Amend the Complaint is **GRANTED** and ROA's Motion to Dismiss is **DISMISSED AS MOOT**.

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O R D E R

AND NOW, this day of February, 2004, in consideration of Plaintiff Nancy Young's ("Plaintiff") Motion for Leave to Amend Complaint Pursuant to Federal Rule of Civil Procedure 15, Defendant Reconstructive Orthopedic Associates, II, P.C.'s ("ROA") response and Plaintiff's reply thereto; and Defendant ROA's Motion to Dismiss Counts Two Through Five of Plaintiff's Amended Complaint, Plaintiff's response and ROA's reply thereto, **IT IS ORDERED** that Plaintiff's Motion to Amend the Complaint (Doc. No. 13) is **GRANTED** and ROA's Motion to Dismiss (Doc. No. 9) is **DISMISSED AS MOOT**.

BY THE COURT:

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JAMES McGIRR KELLY, J.